


NO. 44101-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 10-2-11622-8

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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

TED SPICE,

Appellant,

vs.

DONNA E. DUBOIS, as Personal Representative of the Estate of DORIS
E. MATHEWS, deceased

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This Court should reverse the trial court's rulings: (1) that Donna E. Dubois, as Personal Representative of the Estate of Doris E. Matthews (the "Estate"), was the prevailing party; (2) that Mr. Spice was not entitled to an award of fees and costs; and (3) that Mr. Spice was not entitled to a JNOV or a new trial.

II. REPLY

A. Mr. Spice has properly assigned error to the trial court's findings of facts and conclusions of law.

The Estate argues that Mr. Spice has not properly complied with RAP 10.4(c) because he did not attach a copy of the trial court's decision to his opening brief. However, the trial court's decision has been included in the Clerk's Papers and has been properly cited to by Mr. Spice in his opening brief. Nevertheless, the trial court's decision is being attached hereto in an appendix to this reply brief.

B. The trial court did err in denying Mr. Spice's request for attorney fees.

1. Mr. Spice did prevail on his complaint for damages under the promissory note.

The Estate argues that Mr. Spice was not the prevailing party because he did not prevail on his claim for breach of the January 8,

2004, promissory note (the "Note"). However, he did prevail on his claim on the Note. The Note entitled Mr. Spice to between \$5,000.00 and \$8,000,000.00, for services rendered. (CP 5). Therefore, the range of what Mr. Spice could be entitled to under the Note was significant.

As stated in Mr. Spice's opening brief, the trial took three weeks. (CP 1122). The verdict in the case was provided in the form of distributing property. (CP 939-940). The jury awarded the parties an interest in the properties as follows: "Rental Properties (11003, 11004, 11007, and 11011 58th St. Ct. E):" 25% to Mr. Spice and 75% to the Estate; "Duplex Property (10915-10917 58th St. Ct. E):" 100% to the Estate; "Rental"/Ted (5818 #A and #B Milwaukee Ave E):" 100% to the Estate; 11319 58th St. Ct. E.: 100% to Mr. Spice; 117.8 Acres Kitsap County: 50% to Mr. Spice and 50% to the Estate; .02 Acres Napavine, WA: 100% to Mr. Spice; and 11305 House 58th St. Ct. E.: 100% to the Estate. (CP 939-940). No money was awarded to the Estate as damages based upon its claims. (CP 937-940). The Estate only partially prevailed on its quiet title counterclaim. (CP 939-940).

Because the Estate rejected Mr. Spice's creditor's claim in its entirety, Mr. Spice was forced to file the lawsuit to pursue his

claims against the Estate. He prevailed on his claims because he received a portion of the real properties and defeated the claims asserted by the Estate against him. The Estate argues that the trial court was correct in holding that it was the prevailing party, given that it received a higher percentage of the real property than Mr. Spice. However, the trial court ignored and the Estate continues to ignore the fact that the court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 278-79, 215 P.3d 990, 1016 (2009), *citing*, *Hemenway v. Miller*, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991).

In *Deep Water*, even though the trial court had dismissed the contract claims, the central issue was whether the agreements between the parties protected the views of a lake in perpetuity, whether the view had been impaired, and, if so, what damages followed. *Id.* As such, even though the claim that was successful was for tortious conduct, since it arose from the underlying agreements, an award of fees and costs under the agreements that included an attorney fee provision was appropriate. *Id.* at 278-79. *See, also, Id.*, *citing*, *Seattle-First Nat'l Bank v. Wash. Ins. Guar.*

Ass'n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); *Hill v. Cox*, 110 Wash.App. 394, 411–12, 41 P.3d 495 (2002) (contractual fees awarded when prevailing party elected to proceed on statutory tort claim rather than contract); *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855–56, 942 P.2d 1072 (1997) (contract-based fees awarded for negligence claim when duty breached was created by parties' agreement); 25 David K. DeWolf et al., *Washington Practice: Contract Law and Practice* § 14:18, at 357 (2d ed.2007) (even in cases where plaintiff's claims are founded in tort or another legal theory, award of contract attorney fees may be appropriate).

Here, the relationship between Mr. Spice and Ms. Doris Mathews (“Ms. Mathews”) arose out of the Note and the Plexus Investments, LLC (“Plexus”) Operating Agreement (“Operating Agreement”). Without the Note and Operating Agreement, there would have been no claims between Mr. Spice and the Estate over the properties and who was entitled to them. This is analogous to *Deep Water*, and the cases it cites to where the underlying claims arose out of or were created by the agreements between the parties.

The Estate argues that the counterclaims it filed against Mr. Spice and did not prevail on cannot justify an award of fees and

costs because they are tort claims. However, they arose out of the underlying agreements between Mr. Spice and Ms. Matthews and would not have existed but for the agreements. In order to receive any interest in the properties, Mr. Spice had to defeat the counterclaims and the Estate's affirmative defenses in order receive an interest in the properties. Mr. Spice defeated sixteen affirmative defenses and twenty-four of twenty-five counterclaims. The only claim the Estate partially succeeded on was its quiet title claim.

The cases cited by the Estate are distinguishable. For example, in *Boguch v. Landover Corp.*, 153 Wn. App. 595, 224 P.3d 795 (2009), a property owner sued his real estate agents for common law negligence and breach of their duties under RCW 18.86. *Id.* at 603. In reversing the trial court's decision awarding the property owner attorney fees under the attorney fee provision of the listing agreement between the parties, the *Boguch* court determined that the claims did not arise out of the contract, and the contract was not central to the dispute. *Id.* at 615-16. As examples, it cited to various professional negligence cases, and then stated that, "A claim that a realtor breached his or her professional duties to a seller is not an action on a contract, unless the seller claims that the realtor's omission "violated a specific

contractual undertaking.” *Id.*, citing, *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993).

In this case, Mr. Spice had specific contractual provisions under the Note and the Operating Agreement that provided for him to have an interest in the properties. The determination of whether or not Mr. Spice had an interest in the properties would necessarily require examination of the Note and Operating Agreement. Therefore, the claims were an action on the contract for purposes of determining whether he is entitled to an award of attorney fees. *See, Id.*, citing, *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997) (concluding that the buyer's action was on the contract for the purpose of recovering attorney fees under a contractual fee-shifting provision because her claims arose directly out of duties created by her broker/buyer agreement, the earnest money agreement, and the broker's drafting of the earnest money agreement).

Moreover, even if certain counterclaims that Mr. Spice defended against were considered independent tort claims, he should not have to segregate his time spent defending against those claims. The general rule is that “[if] attorney fees are recoverable for only some of a party's claims, the award must properly reflect a

segregation of the time spent on issues for which fees are authorized from time spent on other issues.” *Boguch*, 153 Wn. App. at 619-20, *quoting*, *Mayer v. City of Seattle*, 102 Wash.App. 66, 79–80, 10 P.3d 408 (2000). However, a trial court need not segregate time, “if it determines that the various claims in the litigation are ‘so related that no reasonable segregation of successful and unsuccessful claims can be made.’ ” *Id.*, *quoting*, *Mayer*, 102 Wash.App. at 80. A “court is not required to artificially segregate time ... where the claims all relate to the same fact pattern, but allege different bases for recovery.” *Id.*, *quoting*, *Ethridge v. Hwang*, 105 Wash. App. 447, 461, 20 P.3d 958 (2001).

In this case, it would be unreasonable to require Mr. Spice’s counsel to segregate the time spent successfully pursuing his claims, and the time spent defending against the tort claims. They were all so closely related, and they all relate to the same fact pattern but simply allege different bases for recovery.

Again, Mr. Spice did not have to receive all of the properties or a majority interest in the properties to be considered the prevailing party for purposes of an award of attorney fees under the Note. In determining the prevailing party, the trial court failed to review the entirety of the claims, counterclaims, and affirmative

defenses asserted in the lawsuit. Instead, it only focused on the interests received in the property and that the Estate received a majority interest. This analysis failed to take into consideration that Mr. Spice had to defend against a multitude of counterclaims and affirmative defenses, and the Estate never offered a portion of the real property to Mr. Spice in response to his creditor's claim. It, instead, rejected his claim in its entirety.

Mr. Spice recovered a portion of the property and defeated the majority of the counterclaims and affirmative defenses asserted by the Estate. Under these circumstances, he was the substantially prevailing party and should be entitled to his attorney fees and costs.

2. Mr. Spice is entitled to recover attorney fees under the Plexus Investments, LLC, Operating Agreement.

The Estate argues that the Plexus Investments, LLC, Operating Agreement ("Operating Agreement") cannot be used as a basis for an award of attorney fees because Mr. Spice did not assert a claim under the Operating Agreement. The Estate is correct that Mr. Spice's Amended Complaint does not include a claim for a breach of the terms of the Operating Agreement. The lawsuit, though, involved having to consider the terms of the Note

and the Operating Agreement. Even the trial court referenced the fact in its findings that jury had to review the Note and Operating Agreement. Since it was considered by the jury and the trial court in reaching a decision, based on the previous arguments, the Operating Agreement supports Mr. Spice's arguments in favor of an attorney fee award in his favor.

3. The trial court did err in finding the attorney fee clauses in the Note and the Operating Agreement unenforceable.

Following the conclusion of the trial, the trial court found serious questions about the enforceability of the Note and Operating Agreement. Therefore, in part, based on this finding, it determined there was no basis for an award of attorney fees. Mr. Spice has argued that the trial court erred in making such a finding because the case law holds that even if the underlying contract that provides for an award of fees is determined to be invalid an award of fees can still be made. The Estate attempts to argue that the cases cited by Mr. Spice in support of this argument are inapplicable.

However, the Washington courts have held that a party who successfully defends an action on a contract by arguing the contract is void is nevertheless entitled to fees pursuant to the contract. *See, Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d

98, 121, 63 P.3d 779 (2003). The cases discussing this issue have held that even though no contract has been formed, the prevailing party is still entitled to fees and costs pursuant to RCW 4.84.330. See, e.g., *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 197, 692 P.2d 867 (1984).

The Estate attempts to distinguish these cases by stating that they are different because they dealt with successful plaintiffs. However, as previously argued, Mr. Spice was the prevailing party, and the trial court erred in holding otherwise. It was error on the part of the trial court to determine that Mr. Spice was not the prevailing party, and it was error on the part of the trial court to find that the Note and Operating Agreement were not enforceable and did not allow for an award of fees and costs to Mr. Spice. In its response, the Estate keeps repeating that Mr. Spice did not prevail under the Note, but he could not have received interests in the real property had he not prevailed under the Note and the claims that arose out of the Note.

4. Mr. Spice's argument for a proportional division of attorney fees is not moot.

The Estate argues that the proportionality analysis does not apply because Mr. Spice was not the prevailing party. Again, Mr.

Spice was partially successful on his claim, he overcame multiple affirmative defenses, and he defended against multiple counterclaims pursued by the Estate.

In *Marassi v. Lau*, 71 Wash. App. 912, 917, 859 P.2d 605, 608 (1993), *abrogated on other grounds, Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash. 2d 481, 200 P.3d 683 (2009), the plaintiff had pursued multiple claims against the defendant, including breach of contract, negligence, fraudulent conveyance, and misrepresentation. *Id.* at 914. Following the trial, the trial court found in favor of the plaintiff on two of the claims but dismissed the remaining claims and awarded the plaintiff attorney fees as the prevailing party. In reversing the decision, the *Marassi* court determined that a proportionality approach was more appropriate because both parties prevailed on certain claims. *Id.* at 917. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset. *Id.* The award of attorney fees to successful defendants is consistent with the underlying philosophy of fee-shifting: to discourage weak cases, encourage settlements, and restore a wronged party to its original position. *Id.*

In this case, Mr. Spice brought claims against the Estate and defended the counterclaims asserted by the Estate against him. If the trial court's decision to deny him an award of attorney fees and costs were to remain, it would not serve the purposes set forth in *Marassi*. Mr. Spice should not have to succeed, in part, on his claims, and then have to defend multiple counterclaims and receive no award for the significant attorney fees and costs he incurred in having to prosecute his claims and defend against the multiple counterclaims that were asserted against him. The trial court's decision encourages weak cases, discourages settlements, and fails to restore a wronged party, i.e., Mr. Spice, to his original position.

Despite the Estate's arguments to the contrary, the reasoning set forth in *Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 130 P.3d 892 (2006) actually supports Mr. Spice's position. In *Transpac*, the court cited to *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 970 P.2d 343 (1999), which involved a claim for specific enforcement of a lease provision and a counterclaim for wrongful removal of timber. *Transpac*, 132 Wn. App. at 219. The *Int'l Raceway* court determined that the analysis in *Marassi* was applicable because both parties prevailed, in part, on their claims. *Id.* The *Transpac* court then concluded that the *Marassi* and *Int'l*

Raceway's analysis were applicable to the facts in its case because both parties had prevailed, in part, on their claims against each other. In rejecting the argument that the analysis could not be applied because it was a case involving multiple distinct and several contract claims, the *Transpac* court stated that, "It is not infrequent that one misunderstanding in a business relationship will generate distinct and severable claims. Indeed, that is what happened in *Int'l Raceway, Inc. v. JDFJ Corp.*" *Id.* at 219.

Mr. Spice entered into the Note with Ms. Matthews, and it generated various claims, counterclaims, and defenses in the litigation. Mr. Spice prevailed on his claims, defended against the counterclaims, in large part, and overcome the affirmative defenses. He should be entitled to an award of attorney fees and costs. The trial court's analysis of who was the prevailing party did not take these factors into account, and it only concentrated on the fact that the majority interest in the properties was awarded to the Estate.

Following this Court's review of this case under the appropriate analysis, if this Court finds that Mr. Spice was not the substantially prevailing party, then the proportionality approach in *Marassi* should have been used by the trial court. The reason being that if Mr. Spice is not considered the prevailing party then, under

the circumstances, neither party wholly prevailed, and the proportionality approach would apply. The proportionality approach is consistent with, “. . . the general trend in Washington law toward establishing more specific standards for awarding attorney fees, thus facilitating more meaningful appellate review. *See, Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 219, 130 P.3d 892 (2006).

5. Mr. Spice’s discussion of the counterclaims and affirmative defenses support an award of attorney fees.

The Estate argues that Mr. Spice’s discussion of the Estate’s counterclaims and affirmative defenses is meaningless. The Estate reasons that Mr. Spice did not prevail on his claim for breach of the Note, so he cannot use the Note as a basis for an award of attorney fees. As addressed in his opening brief and above, the Estate is incorrect in its analysis because Mr. Spice did prevail and is entitled to an award of attorney fees and costs based on the attorney fee provisions in the Note and the Operating Agreement.

The discussion regarding the affirmative defenses and counterclaims in Mr. Spice’s opening brief is important because it supports Mr. Spice’s position that a significant portion of the trial was devoted to defending against the Estate’s counterclaims and overcoming the affirmative defenses asserted by the Estate. When

the defense of the counterclaims in a lawsuit is inextricably intertwined with the establishment of the underlying claim, the plaintiff is entitled to an award of attorney fees in defending against the counterclaims. *See, Mehlenbacher v. DeMont*, 103 Wn. App. 240, 247, 11 P.3d 871 (2000) (holding that plaintiff was entitled to an award of attorney fees in successfully defending against a counterclaim for misrepresentation when it had originally filed a claim to foreclose on a deed of trust).

Here, in order to receive any of the real property, Mr. Spice had to overcome the affirmative defenses and counterclaims plead by the Estate. The Estate repeatedly attempts to argue that Mr. Spice did not prevail on the Note because he only received interests in some of the real property. The Estate's argument fails to take into consideration that Mr. Spice's interest in the real property arose out of the terms of the Note. If Mr. Spice and Ms. Matthews had not entered into the Note and the Operating Agreement, the parties would not have had a relationship with each other that resulted in Mr. Spice having an interest in the real properties. The jury could not have allowed Mr. Spice to retain an interest in the real properties without having found that the Note and Operating Agreement were enforceable.

6. Mr. Spice is entitled to reasonable attorney fees under the lodestar method.

The Estate argues that Mr. Spice is not entitled to an award of his reasonable attorney fees under the lodestar method. This presumes that Mr. Spice is not a prevailing party under the Note, the Operating Agreement, and RCW 4.84.330. As set forth herein, and, in Mr. Spice's opening brief, the Estate's presumption is incorrect, and the trial court's decision should be reversed. Therefore, the lodestar method would be the correct method to use in calculating an award of attorney fees. *See, Mehlenbacher v. DeMont*, 103 Wn. App. 240, 248, 11 P.3d 871 (2000) (holding that Washington has adopted the lodestar method for determining the amount of an award for fees and costs).

C. The trial court did err in denying Mr. Spice's motion for judgment as a matter of law or a new trial.

The Estate argues that the trial court properly denied Mr. Spice's motion for judgment as a matter of law and a new trial. While the motion for judgment as a matter of law was brought after the jury returned its verdict, this Court should still consider the arguments in support of reversing the trial court's decision denying the motion for judgment as a matter of law.

As set forth in Mr. Spice's opening brief, the reasons for

overturning the jury's verdict with respect to the transfers of the interests in property are based on the fact that the jury awarded interests in the property to the Estate that were in direct conflict with the deeds. It awarded a 100% interest in the 11305 property to the Estate, but Ms. Matthews had deeded a 1/3 interest in the 11305 property to Mr. Spice. (RP, date 10/5/12, at 3-12) (Ex. 13). In regards to the 11003 property, Mr. Spice was deeded a 100% in this property. (Ex 18). And, Mr. Spice had a 51% interest in Plexus, so he should have, at the least, received a 51% interest in the properties that were owned by the company. (CP 1424).

Even if this Court believes Mr. Spice waived his right to request a judgment as a matter of law, the arguments in support of a judgment as a matter of law support Mr. Spice's request for a new trial. CR 59(a)(7) provides that a new trial may be granted when "there is no evidence or reasonable inference from the evidence to justify the verdict." The evidence was not clear, unequivocal, and convincing enough to defeat the operation of the deeds that transferred the property to Mr. Spice and Plexus. Mr. Spice should be entitled to a 1/3 interest in the 11305 58th St. E. property, a 100% interest in the 11003 58th St. E. property, and a 51% percent interest in the Plexus properties. This should result in

Mr. Spice being entitled to a new trial.

Despite the Estate's arguments to the contrary, Mr. Spice should also be entitled to a new trial due to the conduct of the Estate's counsel. The Estate argues that Mr. Spice waived his right to request a new trial based on the conduct of the Estate's counsel and cites to the colloquy Mr. Spice's counsel had with the trial court following the questioning of the jury regarding the inappropriate and prejudicial question the Estate's counsel asked of a witness. (RP, date 09/05/12, at 24-25) However, the colloquy has to be reviewed in context. Prior to Mr. Spice's counsel's comments, his counsel had informed the trial court that they did not see how it would be financially feasible for Mr. Spice to proceed to a new trial without having the Estate pay for his attorney fees. In response to the trial court indicating that the questioning may have resulted in grounds for a mistrial, Mr. Spice's counsel stated that, "I don't know either, Your Honor. I don't know how Mr. Spice is going to be able to pay for another trial too. That's what this would result in, and I think that's exactly what they want." (RP, date 09/05/12, at 16-17)

As such, unless the trial court was willing to order that the Estate pay for Mr. Spice's attorney fees, it was not an option to

proceed with a new trial at the time due to the financial circumstances that Mr. Spice was faced with. From a review of the report of proceedings, without the trial court awarding attorney fees to Mr. Spice, he and his counsel had no other choice but to proceed with the trial court's suggestion to question the jurors and then pursue a request for sanctions at the conclusion of the trial. At the conclusion of the trial, when Mr. Spice filed his motion for judgment as a matter of law or for a new trial, the trial court erred in not granting a new trial under the circumstances.

The Estate's counsel had engaged in misconduct that was clearly prejudicial to Mr. Spice, and the jury returned a verdict that was not supported by the evidence. At the most, Mr. Spice waived his absolute right to a mistrial, but he did not waive his right to request a new trial after the verdict. *See, Estate of Lapping v. Grp. Health Co-op. of Puget Sound*, 77 Wn. App. 612, 621, 892 P.2d 1116 (1995) (holding that plaintiff waived an absolute right to a new trial that counsel's misconduct generated, and the matter became one for the trial court's discretion). As such, if there was a waiver, then it becomes a question of whether or not the trial court abused its discretion in not granting a new trial following the jury's verdict.

"If the trial court had any doubt that the [juror] misconduct

affected the verdict, it was obliged to resolve that doubt in favor of granting a new trial.” *Lockwood v. AC & S, Inc.*, 44 Wn. App. 330, 359, 722 P.2d 826 (1986), *quoting*, *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973). Similarly, the trial court’s decision in refusing to grant Mr. Spice’s request for a new trial ignored the prejudice caused by the Estate’s counsel’s misconduct, and it ignored the fact that the evidence presented during the trial did not rise to the level of clear, unequivocal, and convincing in order to set aside the interests Mr. Spice had received in the deeds. If it had, and there had been no misconduct on the part of the Estate’s counsel, then, and only then, would have the evidence supported the jury’s decision to ignore the deeds and reapportion Mr. Spice’s and the Estate’s interests in the properties.

In addition, the trial court’s sanction of \$5,000.00 was inadequate to remedy the harm to Mr. Spice as a result of the Estate’s counsel’s misconduct. The trial court should have granted a new trial.

D. Mr. Spice’s request for attorney fees on appeal should be granted.

For the reasons set forth in his opening brief, and in the arguments set forth above, Mr. Spice is entitled to his attorney fees

on appeal. He would respectfully request that the Court enter an award of attorney fees in his favor for this appeal.

E. The Estate's request for an award of attorney fees on appeal should be denied.

In the event this Court upholds the trial court's decision, the Estate argues that it should be entitled to an award of attorney fees on appeal. In support of its request, in essence, the Estate summarizes the arguments Mr. Spice has made in support of his appeal that he should be entitled to his attorney fees under the Note and Operating Agreement. The Estate cites to the same cases and actually argues that it is entitled to recover on its affirmative defenses and counterclaims because they are inextricably intertwined with the Estate's defense against the Note. These arguments are in direct conflict with the Estate's previous arguments that its affirmative defenses and counterclaims *are not* inextricably intertwined or, in other words, arise out of the Note.

Setting aside the fact that the Estate's position is inapposite to its previously asserted position, an award of fees in favor of the Estate under the Note would not be appropriate. While the trial court found the Estate to be the prevailing party, because it received a majority interest in the real property, it determined it

was not entitled to an award of attorney fees and costs, other than statutory fees and costs, due to the Estate's counsel's conduct, including, but not limited to, the waste of attorney and judicial time, and the trial court's belief that the Note was legally invalid. The trial court did not cite to any authority to support its position, but it appears that the trial court could not find that the Estate substantially prevailed, which would entitle it to an award of attorney fees.

Nevertheless, as previously stated, in interpreting and awarding attorney fees under RCW 4.84.330 Washington courts have consistently held that a prevailing party is a party who receives an affirmative judgment in its favor. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 489, 200 P.3d 683 (2009); *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993); *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). In cases where neither party wholly prevails, the substantially prevailing party, as determined by the extent of relief awarded by the court, is the prevailing party for purposes of RCW 4.84.330. *Marassi*, 71 Wn. App. at 916; *Hertz*, 86 Wn. App. at 105. However, "if both parties prevail on major issues, an attorney fee award is not appropriate" for either of them. *Marassi*, 71 Wn. App. at 916; *Hertz*, 86 Wn. App. at 105; *see also Lewis v. Orozco*, noted at 142

Wn. App. 1006, *review denied*, 164 Wn.2d 1004 (2008).

In cases where the neither party wholly prevails, and both parties do not prevail on major issues, Washington courts may apply a proportionality approach to determine which party is the substantially prevailing party for purposes of awarding attorney fees under RCW 4.84.330. Here, Mr. Spice has argued that he was the substantially prevailing party or, at least, a proportionality approach should have been applied, because, if he did not prevail, neither party wholly prevailed. *See, Marassi*, 71 Wn. App. at 916; *Int'l Raceway, Inc. v. JEFJ Corp.*, 97 Wn. App. 1, 8-9, 970 P.2d 343 (1999); *Hertz*, 86 Wn. App. at 105. But, as stated, a proportionality approach—or an award of attorney fees for either party—is not appropriate if both parties prevail on major issues. *Marassi*, 71 Wn. App. at 916.

This is supported because RCW 4.84.330 does not define the prevailing party as one who prevailed on a claim that authorizes attorney fee awards. Instead, it focuses on the relief afforded to all parties for the entire lawsuit without regard to whether the underlying dispute authorizes an award of attorney fees. *See, Hertz*, 86 Wn. App. at 105; *see also McGary v. Westlake Investors*, 99 Wn. App. 280, 661 P.2d 971 (1983). If this Court upholds the

jury's verdict and the trial court's decision on denying an award of attorney fees and costs, other than statutory fees and costs to the Estate, the above analysis would apply.

As a consequence, even if this Court denies the relief requested by Mr. Spice, the trial court's decision would remain in place, neither party would have substantially prevailed, and the Estate would not be entitled an award of fees on appeal because neither party substantially prevailed for purposes of awarding attorney fees under the Note.

III. CONCLUSION

Based on the foregoing and Mr. Spice's opening brief, he respectfully requests that this Court reverse the trial court's ruling that the Estate was the prevailing party, that he was not entitled to an award of attorney fees as the prevailing party or reverse the trial court's ruling that Mr. Spice was not entitled to a judgment as a matter of law or a new trial and award Mr. Spice his attorney fees and costs on appeal.

Dated this 8th day of July, 2015.

DAVIES PEARSON, P.C.



Christopher J. Marston, WSBA #30571
Attorneys for Ted Spice, Appellant

**APPENDIX A –
COPY OF FINDINGS OF FACT AND CONCLUSIONS OF
LAW RE: ATTORNEY’S FEES**



10-2-11622-8 39386642 FNFCL 10-19-12



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

TED SPICE,

Plaintiff,

vs.

DONNA E DUBOIS,

Defendant.

Cause No: 10-2-11622-8

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: ATTORNEY'S FEES**

Plaintiff's Request for Attorney's Fees

This case was initiated by the Plaintiff, Ted Spice, as an unmarried individual, against the Estate of Doris E. Mathews, deceased, and the personal representative, Donna E. DuBois, in her capacity as the personal representative. Mr. Spice sought money damages, as well as title to eleven (11) pieces of real property located within Pierce County and other counties all contained within Washington State. As a result of a jury verdict, which was filed on September 17, 2012, Mr. Spice was awarded the following:

1. A 25% interest in what has become to be known as "rental properties";
2. A 100% interest 11319 – 58th Street Court E., Puyallup, Washington;
3. A 50% interest in 107.8 acres in Kitsap County; and
4. A 100% interest in .02 acres in Napavine, Washington.

1 Based on the values of the properties and the amount of interest in the
2 real property which was awarded to the Defendant, which was the overwhelming
3 interest, this Court does not declare Mr. Spice, for purposes of awarding attorney's fees,
4 as the prevailing party.

5 The Plaintiffs have argued that they are, in fact, the prevailing party since
6 the Defendants prevailed on only one or two causes of action, out of multiple affirmative
7 defenses and counter claims which were filed by the Defendant. Thus, they believe that
8 they are the prevailing party in terms of the overall number of affirmative defenses
9 which were either dismissed or which were not granted by the jury, and thus would be
10 considered the prevailing party or based on a reasonable attorney's fees provision
11 pursuant to a contractual agreement, specifically a promissory note and operating
12 agreement which were signed by Mr. Spice and the now deceased, Doris E. Mathews.
13 As indicated in these findings, the Court rejects these arguments and finds that there is
14 no contractual basis or statutory provision which would allow this Court to award
15 attorney's fees to Plaintiff's counsel.
16

17 The Court further finds that the initiation of this lawsuit, by Mr. Spice, was
18 high risk to begin with based on the lack of any contemporary accounting which was
19 done throughout Mr. Spice's involvement in this case, lack of best business practices for
20 an attempted multi-million dollar development, and the fact that there were literally
21 hundreds of thousands of dollars unaccounted for during the course of this project.
22 These conclusions are based on the evidence, or lack thereof, which were submitted at
23 the time of trial, the credibility of the witnesses, and the overall legal theories presented
24 by the Plaintiff for recovery.
25

1 The Court further finds that Mr. Spice, when he initially met Ms. Matthews,
2 was on Section 8 housing, was dependent on Social Security Disability for income, and
3 had little or no prior experience in being a project manager/developer of a commercial
4 warehouse facility and/or cancer treatment center as testified to during the trial.

5 The Court further finds that Mr. Spice would have had no independent
6 ability to pay any attorney's fees, except for funds that he would have received through
7 the various mortgages and refinances of the property that were originally owned by
8 Doris E. Mathews and was later transferred to Plexus, LLC.

9 The Court further finds that any monies received by Plaintiff's counsel,
10 during this litigation, more likely than not arose from the original estate of Doris E.
11 Mathews and that the estate should not be liable for any more payment of Mr. Spice's
12 attorney's fees; or, in the alternative, based on the lack of accounting for the hundreds
13 of thousands of dollars which were obtained through the mortgage of Ms. Mathews'
14 separate property and to this day remains unaccounted. The Court finds that Mr. Spice
15 received, or had access to, his own funds through his business dealings with Plexus,
16 LLC.; and had adequate funds to pay his own counsel.

17 **Defendant's Request for Attorney's Fees**

18
19 The defense makes their request for attorney's fees on a similar basis,
20 that they should be considered the prevailing party under any applicable RCW provision
21 as well as any contractual agreement that existed between the parties dealing with the
22 promissory note and development of Plexus, LLC, which would have awarded
23 attorney's fees to the prevailing party.
24
25

1 This Court does find that the Defendants were the prevailing party for
2 purposes of this lawsuit in that the jury awarded well over 50% of the real property
3 which was in dispute to the Estate of Doris E. Mathews. However, this Court finds that
4 a substantial amount of the attorney's fees, which were accumulated in this case, were
5 the result of excessive motion and litigation practice and ineffective use of court time.
6 This Court finds that a large percentage of the pretrial practice, which required the
7 appointment of a special master for discovery, would not have been necessary if the
8 estate had hired counsel with more experience and/or retained co-counsel to assist in
9 what was a very complicated and legally challenging case. Alleging that Mr. Spice was
10 the cause of death of Ms. Mathews is but one example.

11 The pleadings show that a significant amount of time was used by
12 counsel, on both sides, in summary judgments and in motion practice that this Court
13 finds as not being necessary. A significant amount of court resources were spent in the
14 pretrial phase as well as a trial which occupied three weeks for the Court.

15 As defense counsel candidly admitted, this was his first jury trial, in his
16 recent practice, and that he had not had experience in this type of litigation prior to this
17 case. Many of the hours spent by defense counsel in preparing his defense would not
18 have been necessary if counsel with more experience and jury trial litigation practice
19 had been retained or would be as available as co-counsel.

20 This Court also repeats its finding that it has serious questions regarding
21 the legality of the documents upon which both parties are relying on with regard to their
22 contractual source of the reasonable attorney's fees request; specifically, a promissory
23 note and the Plexus, LLC, operating agreement. Although no specific jury instruction
24
25

1 was requested to make a finding as to whether or not those documents were in fact
2 credible, the Court can only infer, from the decision of the jury which weighed heavily in
3 the ultimate result in favor of the Estate of Doris E. Mathews, that they also shared
4 those questions regarding the legality of said documents. Thus, in the light of what I
5 consider to be the demonstrated lack of experience on behalf of defense counsel, the
6 excessive motion practice, and the commitment of court resources, including a special
7 master, that an award of statutory attorney's fees would be reasonable in the amount of
8 \$200.00, plus additional statutory costs as allowed by RCW 84.09.010.

9 This Court is aware of the factors which case law has required the Court
10 to review, under its decision in Mahler, and the "lodestar" analysis. However, the Court
11 is not making an analysis, under either one of these balancing requirements, since the
12 Court does not find a legal basis for attorney's fees in order to proceed with such
13 analysis.
14

15 Conclusions of Law

16 Neither the Plaintiff's counsel, nor Defendant's counsel, are entitled to
17 reasonable attorney's fees based on the arguments presented in their respective
18 briefings, for the reasons articulated in the findings of fact.

19 The Plaintiff is not the prevailing party. The Plaintiff had sufficient funds to
20 pay his own attorney. Funds paid by Mr. Spice to his counsel, more likely than not,
21 came from estate funds.

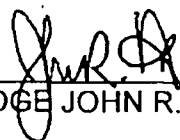
22 The Court does not find there is a contractual basis to award fees.

23 The Defendant is awarded statutory attorney's fees and costs. The Court
24 does not believe there is a contractual basis to award fees. Even if by argument there
25

1 was a legal basis for attorney's fees, fees would not be awarded based on the Mahler
 2 considerations discussed in the findings of fact (i.e., substantial number of counter
 3 claims or affirmative defenses were baseless, inexperience of counsel, excessive
 4 motion practice, failure to obtain more experienced co-counsel, and extension of court
 5 time as result of the above factors.).

6 Defense counsel, Mr. Roesch, is awarded statutory attorney's fees only of
 7 \$200.00, as well as statutory costs enumerated under RCW 84.09.010, of \$2,000.00.

8 DATED this 18 day of October, 2012.

11 
 JUDGE JOHN R. HICKMAN

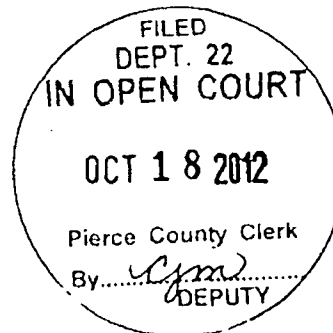
12 CC mailed to:

13 Steve Hansen, Atty.

14 Brian Krikorian, and

15 Atty. Brian Roesch

16 10-18-12. Cym



NO. 44101-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Pierce County Superior Court Cause No. 10-2-11622-8

TED SPICE,

Appellant,

vs.

DONNA E. DUBOIS, as Personal Representative of the Estate of DORIS
E. MATHEWS, deceased

Respondents.

FILED
COURT OF APPEALS
DIVISION II
2015 JUL -8 PM 3:21
STATE OF WASHINGTON
BY DEPUTY

**AFFIDAVIT OF SERVICE OF APPELLANT'S REPLY
BRIEF**

Christopher J. Marston, WSBA #30571
DAVIES PEARSON, P.C.
920 Fawcett Ave.
Tacoma, WA 98402
253-620-1500
Attorneys for Appellant

STATE OF WASHINGTON)

ss.

COUNTY OF PIERCE)

Kathy Kardash, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one (21) years, not a party to the above-entitled action and competent to be a witness therein.

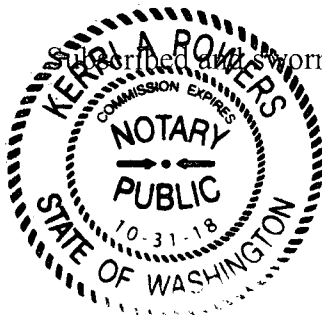
That on the 8th day of July, 2015, affiant sent for delivery by placing an envelope affixed with first class postage pre-paid and depositing with the U.S. Postal Service to the following:

**Christopher M. Constantine
OF Counsel, Inc., P.S.
P.O. Box 7125
Tacoma, WA 98417-0125
Attorneys for Respondents**

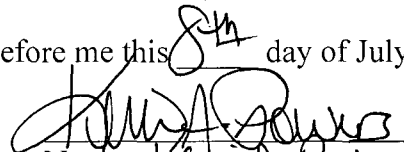
true and correct copies of Appellant's Reply Brief and this Affidavit of Service.

Dated this 8th day of July, 2015.


KATHY KARDASH



Subscribed and sworn to before me this 8th day of July, 2015.


Name: Keri A. Powers
Notary Public in and for the State of
Washington, residing at Puyallup.
My Commission expires: 10-31-18.